IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

MONDAY, THE 17TH DECEMBER 2007 / 26TH AGRAHAYANA 1929

SA.No. 848 of 1994(A)

AS.3/1993 of SUB COURT, VADAKARA
OS.5/1991 of MUNSIFF COURT, VADAKARA
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APPELLANTS/RESPONDENTS 2-7/2ND DEFENDANT AND LEGAL HEIRS OF 1ST DEFENDANT:
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1. KADEEJA, W/O.KUNHALI HAJI RESIDING AT NIDIYANDIYIL HOUSE, URALUNGAL AMSOM, MADAPPILLI DESOM, VADAKARA TALUK, MADAPPALLY COLLEGE.P.O., KOZHIKODE DISTRICT

2. NIDIYANDIYIL SAKEENA, D/O.KUNHALI HAJI, -DO- -DO-

3. NIDIYANDIYIL SAKEER, S/O.KUNHALI HAJI, -DO- -DO-

4. NIDIYANDIYIL SAKKARIYA (MINOR AGED 16 YEARS) S/O.KUNHALI HAJI, -DO- -DO- -DO-

5. KIDIYANDIYIL SAMEERA (MINOR AGED 6 YEARS) D/O.KUNHALI HAJI, -DO- -DO-

6. NIDIYANDIYIL SAMEER (MINOR AGED 9 YEARS), S/O.KUNHALI HAJI, -DO- -DO-

(MINOR APPELLANTS 4-6 REP.BY THEIR MOTHER AND GUARDIAN 1ST APPELLANT)

BY ADV. DEEPA.M.M

RESPONDENT/APPELLANT/PLAINTIFF:

SURYA MOHAN, S/O.CHERIYA KUNKAN, RESIDING AT URALUNGAL AMSOM, MADAPPILLY COLLEGE.P.O., KOZHIKODE DISTRICT

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 17/12/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ORDER ON C.M.P.NO.1480/95 & 1869/94 IN SA 848/94

DISMISSED

17/12/2007

SD/-M.SASIDHARAN NAMBIAR,JUDGE.

//True copy//

PA to Judge.

M.SASIDHARAN NAMBIAR,J.

S.A.NO.848 OF 1994

Dated 17th December 2007

J U D G M E N T

Defendants in O.S.5/1991 on the file of Munsiff court, Vadakara are the appellants. Respondent is the plaintiff. Respondent instituted the suit seeking a decree for realisation of Rs.3,000/- less Rs.300/- being the amount of rent payable by him contending that Rs.3,000/- was paid as advance and obtained the building on lease and when first respondent tendered the key by surrendering the lease it was not received by first defendant and therefore he is entitled to realise Rs.2,700/- being the balance advance amount paid. Appellants resisted the suit contending that Ext.A1 agreement was not executed and Rs.3,000/- was not received as advance and therefore respondent is not entitled to the decree. Learned Munsiff on the evidence of PW1, DW1, Exts.A1 to A5 and B1 dismissed suit holding that Ext.A1 agreement was not proved and the lease was created not under Ext.A1 but under Ext.B1 registered

kaichit and it does not disclose payment of advance amount and therefore respondent is not entitled to the decree sought for. Respondent challenged the judgment before Sub court, Vadakara in A.S.3/1993. Learned Sub judge on re-appreciation of evidence found that signature seen in Ext.A1 is that of second appellant. Said decision was arrived at by comparing the signatures seen in Ext.A1 with admitted signature in Exts.A2, A3 and A5. Relying on the evidence of PW1 it was found that Ext.A1 was executed by second appellant on behalf of first appellant. Relying on the evidence of DW1 it was found that second appellant was receiving the rent and issuing receipts for first appellant and therefore Ext.A1 agreement establishes that Rs.3,000/- was paid as advance amount and was received by second appellant for first appellant and therefore granted a decree directing appellants to pay Rs.2,700/- with interest at 12% per annum from the date of the suit till realisation. Additional respondents were impleaded in the first appeal as legal heirs of deceased first defendant. Aggrieved by the judgment, additional respondents before the first appellate court filed the second appeal.

2. Without admitting appeal notice was issued to respondent. As notice was not served on respondent, at the instance of appellants notice was issued to a person who is shown as power of attorney holder of the respondent. Though notice was served on him he did not appear.

3. Adv.Smt.Deepa.M.M, learned counsel appearing for appellants was heard. Learned counsel vehemently argued that when execution of Ext.A1 agreement was denied and lease was created under Ext.B1 registered kaichit and it does not show payment of any advance and respondent was not examined and respondent has no case that Rs.3,000/- was paid through Sathyanathan, first appellate court should not have accepted the evidence of PW1 to accept execution of Ext.A1 which was rejected by the trial court. It was argued that when the lease was granted under Ext.B1 kaichit and it does not show any payment of advance it is improbable that subsequently agreement will be executed whereunder advance amount was paid and first appellate court should not have accepted Ext.A1 by comparing signature in Ext.A1 with signatures in other records available in the court records, especially when as DW1 first appellant

denied the signature. It was argued that in any case first appellate court should not have granted a decree in favour of respondent and that too directing payment with interest at 12% per annum when even in the plaint interest is claimed only at 6%.

4. On hearing the learned counsel and as respondent did not appear, the following substantial questions of law are formulated.

> 1) When tenancy in favour of respondent is created under Ext.B1 registered kaichit and it does not show payment of advance amount whether first appellate court was justified in accepting Ext.A1 on comparing the signatures seen in Ext.A1 and that too when the signature was denied by first appellant.
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> 2) Whether first appellate was justified in granting interest at 12% per annum for the advance amount.

5. It is admitted case that plaint schedule building belongs to deceased first defendant. Second defendant wife was managing the affairs of the husband during his absence. On the evidence first appellate court found that wife was collecting rent and was also issuing receipts on behalf of the husband. It was also found that lease in favour of respondent was created

under Ext.B1 kaichit on 10/7/1986 and it does not show payment of any advance amount. According to respondent Ext.A1 agreement was subsequently executed on 16/7/1986 whereunder Rs.3,000/- was received by second defendant wife on behalf of first defendant though it was not specifically shown in Ext.A1. On the other hand, Ext.A1 shows that agreement was executed by first defendant, though it was signed on behalf of first defendant by his wife second defendant. Argument of learned counsel is that in the light of Exts.A1 and B1, first appellate court should not have reversed the findings of trial court. Before institution of suit respondent caused to send Ext.A3 lawyer notice which was received by first defendant. Under Ext.A3 notice it was specifically contended by respondent that agreement was signed for first defendant by second defendant on 10/7/1986 and Rs.3,000/- was paid and received as advance. Ext.A4 is the reply sent by first defendant to Ext.A3 lawyer notice. Even though fact that second defendant had signed Ext.A1 agreement for first defendant on 16/7/1986 was mentioned in Ext.A3 and it was also alleged that Rs.3,000/- was paid as advance, in Ext.A4 these aspects were not denied. On the other hand, allegation in Ext.A3

that key was tendered by Sathyanathan brother of respondent alone was denied, in addition first defendant has denied return of Rs.3,000/- as advance. If there was no agreement executed by second defendant for and on behalf of first defendant as stated in Ext.A3 notice on 16/7/1986, under Ext.A4 reply that fact would have been specifically denied. Failure to deny such a case in Ext.A4 is fatal in the circumstances of the case. As rightly found by first appellate court, evidence establish that first defendant was not at his native place and business and affairs of first defendant was being managed by second defendant. Ext.A1 shows that though agreement was prepared, as if it was executed by first defendant, his wife second defendant executed it for the husband. Though as DW1 wife denied the signature under Ext.A1, first appellate court compared the signature seen in Ext.A1 with the admitted signatures and found that signatures are identical. Signatures seen in Ext.A1 was compared with the signatures seen in Exts.A2 and A5 receipts which admittedly contain signatures of first appellant. On such comparison I do not find any difference in the signature, as rightly found by first appellate court. If

that be so, it is taken that Ext.A1 agreement contains signature of second defendant. Appellants have no case that signature of appellant was given in blank stamp paper so as to enable respondent to concoct the documents. First appellate court on appreciating the evidence found that evidence of PW1 who was earlier employee of the husband of first defendant was credible and reliable. On that evidence it was found that Ext.A1 agreement was executed. In the light of that factual finding. I do not find any reason to interfere with the finding of first appellate court that respondent paid Rs.3,000/- as advance, which was received by second defendant wife for first defendant, who was acting on his behalf. Therefore, first appellate court rightly granted a decree for realisation of said amount.

6. Then the only question is with regard to interest. Argument of learned counsel is that plaintiff claimed only 6% interest in the plaint and therefore granting of interest at 12% per annum is not sustainable. Argument is based on the fact that in paragraph 12 of the plaint interest was claimed only at 6%. It is seen from the original plaint that interest was claimed at 12%. Though originally 6% was shown, it

was corrected as 12%. In the relief portion also it was specifically pleaded for a decree for return of Rs.2,700/- with 12% interest per annum. Therefore, it cannot be said that first appellate court granted interest at more than what was sought for by plaintiff. More over, advance amount to be repaid by appellant is the amount received for the commercial transaction. Hence prohibition provided under Section 34 of Code of Civil Procedure with regard to future interest is not applicable. There is no merit in the appeal. It is dismissed.

M.SASIDHARAN NAMBIAR,
JUDGE.

uj.

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M.SASIDHARAN NAMBIAR,J.

JUDGMENT

S.A.NO.848 OF 1994

17th December 2007

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